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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 672 F.2d 732. The ruling of the Federal Labor Relations Authority (Pet. App. 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (Pet. App. 12a-13a), and a timely petition for rehearing was denied on July 13, 1982 (Pet. App. 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 10, 1982. The petition was filed on that date and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. V) 7131 provides:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 5702(a) provides:

> Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

5 U.S.C. 5707(a) provides:

> The Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter, except that the Director of the Administrative Office of the United States Courts shall prescribe such regulations with respect to official travel by employees of the judicial branch of the Government.

STATEMENT

1. In October 1978, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act"). Title VII of the Act (5 U.S.C. (Supp. V) 7101 *et seq.*) governs labor-management relations, including collective bargaining, for nearly all federal agencies.[1] Title VII replaced the federal labor relations

[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. (Supp. V) 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within

program created in 1962 by Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Compilation).[2]

Title VII protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. (Supp. V) 7102), and it establishes a duty to bargain collectively in good faith. See 5 U.S.C. (Supp. V) 7116(a)(5) and (b)(5). The statute also outlines the matters subject to the bargaining obligation. See 5 U.S.C. (Supp. V) 7103(a)(12) and (14), 7117. Certain management rights are excluded from the scope of bargaining. 5 U.S.C. (Supp. V) 7106. However, an agency must negotiate with a recognized union over procedures the agency will follow in exercising its reserved management rights. 5 U.S.C. (Supp. V) 7106(b)(2). The provisions of Title VII are to be read "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

The Act establishes the Federal Labor Relations Authority ("FLRA" or "Authority") as a three-member independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process under Title VII.[3] FLRA activities include adjudication of negotiability disputes, unfair labor practice complaints, bargaining unit issues, and arbitration exceptions, conduct of elections, and rulemaking. See 5 U.S.C. (Supp. V) 7105(a)(2)(A)-(I). The

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the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

[2] The executive order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Compilation), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634 (1971-1975 Compilation) and 3 C.F.R. 957 (1971-1975 Compilation).

[3] The FLRA replaced the Federal Labor Relations Council, which had similar responsibilities under the executive order program.

FLRA has the authority to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals (5 U.S.C. (Supp. V) 7123(b)). Persons, including federal agencies, who are aggrieved by any final FLRA order may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. This case concerns the proper interpretation of 5 U.S.C. (Supp. V) 7131(a), which provides that federal agencies must grant "official time" to employee negotiators who represent their union in collective bargaining with the agency during hours they would otherwise be in a duty status. A grant of official time allows employee union representatives to be paid as if they were at work, without being charged for annual leave. Under the original Exec. Order No. 10988, granting of official time for employee union representatives was solely within an agency's discretion. See 3 C.F.R. 521, 524-525 (1959-1963 Compilation); *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d 1242, 1243-1244 & n.2 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). The original executive order did not mention employee union representatives' travel expenses and per diem allowances in connection with negotiations. *Id.* at 1243-1244.

In 1965, the Comptroller General determined that Exec. Order No. 10988 did not permit payment of union travel costs or overtime compensation for collective bargaining. See 44 Comp. Gen. 617, 618. The Comptroller General reasoned that although collective bargaining may contribute to the effective conduct of public business, employee union representatives could not be said to be conducting official business during negotiations. Rather, the negotiating activities of such representatives were primarily in the interest of the employee organization they represented. *Ibid.*

The Comptroller General subsequently modified this absolute prohibition. See 46 Comp. Gen. 21, 21-22 (1966). Although the Comptroller General concluded that as a general rule federal agencies should not pay travel expenses for employee bargaining agents who attended negotiation sessions, he determined that such expenses could be paid if, consistent with new Civil Service Commission guidelines, an agency head certified that the employee representatives' travel would be in the primary interest of the government. *Ibid.* For example, an agency might find that it would be in the primary interest of the government to meet at a particular site and that it would be more economical to pay travel costs for employee union representatives than to pay such costs for agency representatives to travel to a different site. *Ibid.*

In 1970, Exec. Order No. 11491 superseded Exec. Order No. 10988. The new order originally stated flatly that federal employees representing a union in negotiations with management could not receive official time for negotiations. See 3 C.F.R. 861-862, 873-874 (1966-1970 Compilation); *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1244. In 1971, following a review of the federal labor relations program, Exec. Order No. 11491 was amended by Exec. Order No. 11616. See 3 C.F.R. 605 (1971-1975 Compilation); *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1244. The amendment allowed agencies to agree to grant official time for employee union representatives up to 40 hours or up to one-half the time spent in negotiations during regular working hours. *Id.* at 1244-1245. In spite of this change with respect to official time, Exec. Order No. 11491 as amended still did not authorize agencies to pay travel expenses or per diem allowances for employees serving as union representatives. *Id.* at 1245; Pet. App. 42a n.6; Federal Labor Relations Council, Report and Rec-

ommendations on the Amendment of Executive Order 11491 (*Legis. Hist.* 1258, 1264).[4]

When Congress enacted Title VII of the Civil Service Reform Act of 1978, it changed certain of the prior executive order policies. In particular, Congress provided in 5 U.S.C. (Supp. V) 7131(a) for the grant of essentially unlimited amounts of official time for certain employee union representatives engaged in negotiation of a collective bargaining agreement. However, neither Title VII nor its legislative history contained any reference to travel payments or per diem allowances for these employee union bargaining agents.

3. In November 1978, petitioner, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, notified the National Treasury Employees Union ("the Union") that it intended to move its Lodi, California, office to Sacramento, and to establish a reduced duty post at a new location in Lodi (Pet. App. 2a). The Union, which represented some of the Bureau's employees affected by the relocation, informed the Bureau that it wished to negotiate concerning the move and its impact on employees in the bargaining unit (*id.* at 22a). The Union designated as its bargaining agent for these negotiations Donald Pruett, a Bureau employee who lived in Madera, California, and was stationed in Fresno (*id.* at 2a). Pruett notified the Bureau that he wished to inspect the new facilities

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[4] The Federal Labor Relations Council report is reprinted in Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) ("*Legis. Hist.*").

(Keehan deposition of Mar. 7, 1980, at 11).[5] Bureau officials agreed to meet with Pruett at the proposed Sacramento office to examine the facilities there and in Lodi (Pet. App. 2a).

On the morning of February 23, 1979, several Bureau officials met Pruett in Sacramento and toured the offices. They inspected the physical facilities and the location of the desks, as well as the availability of restrooms, a cafeteria, and parking (Tr. 28-29, 54-56). Pruett "wandered around" by himself for a time, examining the building and offices (*id.* at 28-29). The parties then drove to Lodi and, after lunch, toured the new reduced office site, examining the proposed arrangement of desks, parking, and access to restaurants (*id.* at 57-66).

Pruett and the Bureau officials then went to the existing Lodi office where they discussed the impact of the planned move (Pet. App. 2a). Pruett pronounced the new facilities acceptable, except for parking availability in Sacramento (*id.* at 24a-25a). The parties discussed assignment of employees to the two new offices and the possibility of excusing employee tardiness for the first week in Sacramento (*id.* at 25a). On the day of negotiations, Pruett left his home in Madera around 6:15 a.m. and returned at approximately 5:45 p.m., traveling a total of some 300 miles in his own car (*ibid.*; Tr. 36, 37).

Pruett sought to have the February 23 session classified as a quarterly meeting for which official time was authorized in the collective bargaining agreement between the Union and the Bureau (Pet. App. 3a). The Bureau refused Pruett's request on the ground that the

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[5] The deposition of Mardell Keehan, a Bureau personnel specialist, is part of the record in this case (Tr. 8-11, 68-69). "Tr." refers to the transcript of the February 27, 1980, hearing before the FLRA Administrative Law Judge.

agreement did not authorize official time for mid-term negotiations, as opposed to the quarterly meetings (*id.* at 3a, 23a).[6] The Bureau informed Pruett that he could take either annual leave or leave without pay for the day he had been away from his post (*id.* at 3a).

4. In June 1979, several months after the Bureau's decision not to authorize official time for Pruett, the Union filed an unfair labor practice charge with the FLRA. The Authority's General Counsel issued a complaint charging that Pruett was entitled to official time for his day of touring and negotiating under 5 U.S.C. (Supp. V) 7131(a) (Pet. App. 27a). In the course of a hearing before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying his salary, the Bureau should have paid Pruett's travel expenses and a per diem allowance (*id.* at 3a).

In December 1979, shortly before the General Counsel filed this complaint against the Bureau, the FLRA had issued an Interpretation and Guidance concerning official time and travel expenses and per diem (2 F.L.R.A. No. 31 (1979); Pet. App. 35a-47a).[7] In its Interpretation, the Authority first concluded that under 5 U.S.C. (Supp. V) 7131(a) federal agencies must grant official time to employee union representatives for all types of collective bargaining, including mid-term negotiations (Pet. App. 37a-41a). The Authority then found that, although Section 7131(a) and its legislative history

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[6] The agreement also made no reference to payment of a per diem allowance or travel expenses of employee union representatives engaged in collective bargaining (R. 136).

[7] Although the Authority provided a notice and comment period, the Interpretation apparently was issued not under the Authority's statutory power to promulgate regulations (5 U.S.C. (Supp. V) 7134), but rather under 5 U.S.C. (Supp. V) 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations (Pet. App. 4a).

nowhere mention travel expenses or per diem allowances, that section nonetheless requires federal agencies to pay such costs for all employee union representatives for whom official time is granted for collective bargaining activities (Pet. App. 41a-45a).

Following the hearing, the Administrative Law Judge found that negotiations had indeed taken place between Pruett and Bureau officials on February 23, 1979 (Pet. App. 30a-31a). The ALJ stated that he considered himself constrained to follow the Authority's recent Interpretation and Guidance (*id.* at 28a-29a). He accordingly recommended that the Bureau be ordered to grant Pruett official time for the day of negotiations and to pay his travel costs and per diem, and that it be required to post a notice stating that the Bureau would do the same for employee union representatives in future negotiations (*id.* at 32a-33a).

The Bureau timely filed exceptions to the ALJ's decision. In September 1980, the Authority affirmed and adopted the decision of the ALJ and ordered the recommended relief (Pet. App. 15a-19a). The Bureau then sought review in the court of appeals pursuant to 5 U.S.C. (Supp. V) 7123(a), and the Union intervened as a party in that appeal.

5. On appeal, the Bureau raised two issues: (1) whether 5 U.S.C. (Supp. V) 7131(a) requires agencies to grant official time to employee union representatives for mid-term negotiations; and (2) assuming that official time is required, whether Section 7131(a) also requires payment of travel expenses and per diem allowances of employee union representatives. The court of appeals enforced the Authority's order on both issues (Pet. App. 1a-11a).

The court first held that it must give deference to the Authority's Interpretation and Guidance if it was reasoned and supportable (Pet. App. 4a-5a). The court concluded that the Authority's decision regarding official

time for mid-term bargaining was reasonable, citing the language of the statute and its history (*id.* at 5a-9a).[8] The court gave relatively little attention to the issue of travel costs and per diem. It recognized, as did the Authority, that neither the statute nor its history refers to such payments (*id.* at 9a). The court reviewed the three reasons offered by the Authority in its Interpretation and Guidance as support for the view that the statute nonetheless requires payment of travel expenses and per diem[9] and concluded that the Authority's Interpretation appeared reasonable (*id.* at 9a-10a).

SUMMARY OF ARGUMENT

1. As the Federal Labor Relations Authority itself has conceded (Pet. App. 42a), neither Title VII nor its history "expressly adverts to the payment of travel expenses or per diem during participation in * * * negotiation activities" (footnote omitted). The provision the Authority cites as the basis for requiring a federal agency to pay travel expenses and per diem of em-

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[8] We have not sought review of this aspect of the court's decision.

[9] The court summarized (Pet. App. 9a-10a) the three reasons set out in the Authority's Interpretation and Guidance. The Authority had cited the fact that the language of Section 7131(a) is similar to that of 5 U.S.C. (Supp. V) 7131(c), which the Authority previously had interpreted as requiring payment of union travel expenses and per diem. (Section 7131(c) governs availability of official time for participation in proceedings before the Authority; like Section 7131(a), it does not mention travel expenses or per diem.) In addition, the Authority had concluded that employee union negotiators who were on official time while they were engaged in collective bargaining must be considered to be conducting "official business," so that they would be entitled to travel expenses and per diem under a separate statute, 5 U.S.C. (& Supp. V) 5702. Finally, the Authority had stated that payment of travel expenses and per diem would be consistent with a congressional intent in Title VII to equalize the positions of management and labor.

ployee union representatives—5 U.S.C. (Supp. V) 7131(a)—refers only to authorization of "official time" for such representatives. The consistent practice prior to the passage of Title VII was that federal agencies generally did not pay union travel expenses and per diem. This also is the rule in the private sector. The absence of any expression by Congress of an intent to change the prevailing practice indicates acceptance of that practice. Although Congress did change certain features of the federal labor-management relations program when it enacted Title VII, it set out those changes explicitly in both the statute and the legislative history, in contrast to its silence here.

Rather than supporting the Authority's Interpretation, the provisions of Title VII suggest that Congress did not intend that federal agencies defray travel expenses and per diem of employee union representatives. Under 5 U.S.C. (Supp. V) 7131(a), the provision the Authority cites, "official time" is authorized only for periods in which an employee "otherwise would be in a duty status." Since travel expenses and those expenses covered by a per diem allowance usually occur outside normal duty hours, it is unlikely that Congress would have used Section 7131(a) as a vehicle to require agency reimbursement of such expenses. Another section, 5 U.S.C. (Supp. V) 7101(b), states that the provisions of Title VII are to be interpreted in a manner consistent with "the requirement of an effective and efficient Government." The Authority's Interpretation, which places virtually the entire cost of negotiations on one party, applies unequal pressure on the parties, thereby undermining the effectiveness of collective bargaining. Finally, the Authority's Interpretation is likely to frustrate an important aim of Title VII—reducing labor-management friction in the federal sector. Monitoring of the reasonableness of union travel expenses would require agencies to intrude on internal union affairs and

would surely lead to disagreements about whether particular expenses are justified.

2. The conclusion of the court of appeals that the Authority's Interpretation is correct is inconsistent with well-established principles of statutory construction. This Court has emphasized that a statute should not be read in a manner that would impose significant monetary liability on the government unless Congress has indicated clearly that it intended such a result. See *United States* v. *Zazove*, 334 U.S. 602, 616-617 (1948). The Court also has made clear that waivers of sovereign immunity are to be strictly construed and must be unequivocally expressed. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Authority's Interpretation, however, imposes substantial monetary liability on federal agencies without any indication that Congress favored that result.

The principle on which the court of appeals did rely—deference to the statutory interpretation of an administrative agency—is one that is inappropriate in this case. The Authority's Interpretation is an interpretative rule and thus is entitled to less deference than a rule promulgated under its rulemaking authority. Moreover, the Authority relied in large part on its construction of 5 U.S.C. (& Supp. V) 5701-5709, a statute it does not administer. Finally, the Authority's Interpretation does not deserve deference because it involves a major policy decision—whether federal agencies should be required to expend substantial sums to fund employee union travel and per diem—that is properly made by Congress. See, *e.g.*, *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965).

3. The reasoning offered in the Authority's Interpretation in support of the conclusion that 5 U.S.C. (Supp. V) 7131(a) requires federal agencies to pay travel expenses and per diem of employee union representatives cannot withstand scrutiny. The Authority cited the fact

that its interpretation of Section 7131(a) was consistent with its earlier construction of 5 U.S.C. (Supp. V) 7131(c), which addresses authorization of "official time" for participation in proceedings before the Authority. But no court has approved the Authority's construction of Section 7131(c), so that consistency does not suggest that either interpretation is correct.

The Authority also asserted that employee union representatives must be regarded as conducting "official business" of the government and therefore are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5701-5709. However, Congress' conclusion that federal sector collective bargining is in the public interest does not suggest that employee union representatives are conducting "official business," since union representatives do not represent the interests of the agency, but rather those of the union and members of the bargaining unit. Indeed, the Comptroller General has recognized that employee union representatives who are on official time during negotiations are *not* conducting official business, despite the fact that collective bargaining may contribute to effective government. 44 Comp. Gen. 617, 618 (1965). Similarly, the Administrator of General Services, who is authorized to promulgate regulations for the administration of 5 U.S.C. (& Supp. V) 5701-5709, has never indicated that collective bargaining by employee union representatives constitutes "official business."

The Authority's final justification for its Interpretation was that agency payment of union travel expenses and per diem would help equalize the positions of union and agency negotiators. But while Congress itself took certain steps to alter the relative positions of federal

employee unions and agencies, there is no indication that it delegated broad authority to the FLRA to take additional steps that would alter the balance established by the express provisions of Title VII. Moreover, genuine equality would call for each party to bear its own costs, as is the norm in the private sector.

4. There is no question that Congress in enacting Title VII intended to encourage collective bargaining in the public sector, which it expressly found to be in the public interest. See 5 U.S.C. (Supp. V) 7101(a). But the Authority's Interpretation does not advance the interest in collective bargaining; rather, it impedes it. The collective bargaining process is best served when each party to negotiations uses its own resources to fund the out-of-pocket expenses of its negotiators, not when one of the parties is required to subsidize the entire process.

The court below is the only court of appeals that has accepted the Authority's Interpretation. Three other courts of appeals have rejected the view that Section 7131(a) requires federal agencies to pay travel expenses and per diem allowances of employee union representatives. See *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983); *Div. of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45 (2d Cir. 1982), petition for cert. pending, No. 82-1021 (filed Dec. 16,1982); *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d 1242 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). Those courts correctly concluded that Congress did not intend to impose this unprecedented requirement on federal agencies and the federal fisc.

ARGUMENT

TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, 5 U.S.C. (SUPP. V) 7131(a), DOES NOT REQUIRE THAT A FEDERAL AGENCY PAY A PER DIEM ALLOWANCE AND TRAVEL EXPENSES TO EMPLOYEE UNION REPRESENTATIVES ENGAGED IN COLLECTIVE BARGAINING WITH THE AGENCY

A. Neither the Language of Title VII Nor Its History Indicates That a Federal Agency Must Pay a Per Diem Allowance and Travel Expenses to Employee Union Representatives Engaged in Collective Bargaining with the Agency

Nothing in the language or legislative history of Title VII suggests that Congress intended to require federal agencies to pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency. The Federal Labor Relations Authority itself has conceded (Pet. App. 42a) that neither Title VII nor its history "expressly adverts to the payment of travel expenses or per diem during participation in * * * negotiation activities." The Authority nevertheless concluded that such payments are required by 5 U.S.C. (Supp. V) 7131(a), a section of Title VII. In fact, Section 7131(a) refers only to grants of "official time" to employee union representatives and nowhere mentions the wholly separate issue of travel expenses and per diem.[10] Nor is there any mention of travel expenses and per diem in any other section of Title VII or in the considerable legislative

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[10] 5 U.S.C. (Supp. V) 7131(a) provides:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

history of the statute. Congress' total silence on the subject strongly indicates that it did not intend to impose an unprecedented requirement that federal agencies pay such expenses.

1. Several considerations make it quite unlikely that Congress would have imposed an obligation on agencies to pay travel expenses and per diem of employee union representatives without even mentioning that subject. As described at pages 5-7, *supra*, the consistent practice prior to the passage of Title VII was that agencies did not pay such costs; in fact, under the decisions of the Comptroller General, agencies were prohibited from doing so as a general rule. See 46 Comp. Gen. 21 (1966). The Federal Labor Relations Council, the Authority's predecessor, recognized this consistent practice in its 1971 report. See *Legis. Hist.* 1264. Thus, the normal pattern at the time Title VII was enacted was for each party to a negotiation to defray the expenses of its own representatives. See Pet. App. 42a n.6.

In view of this settled practice and the absence of any expressions of congressional intent to change it, Title VII should not be read to mandate a departure from the prior pattern. See *Finnegan* v. *Leu*, No. 80-2150 (May 17, 1982), slip op. 9 n.12 ("We think it virtually inconceivable that Congress would have prohibited [a] long-standing [union] practice * * * without any discussion in the legislative history of the Act"); *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983), slip op. 1884 (congressional silence concerning union travel expenses and per diem indicates acceptance of the pre-Title VII practice). It must be presumed that Congress was aware of the existing practice when it enacted Title VII. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress' failure affirmatively to alter the settled practice indicates that it intended not to reverse the practice, but rather to codify it. See *Haig* v. *Agee*, 453 U.S. 280, 300 (1981); *Lorillard* v.

Pons, supra, 434 U.S. at 580; *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948). See also *Burnet* v. *Harmel*, 287 U.S. 103, 108 (1932). Moreover, since a switch to a requirement that agencies pay per diem and travel expenses for employee union representatives would force agencies to make substantial expenditures from their limited funds, it is particularly unlikely that Congress would have made such a change sub silentio.[11] The legislative history does not indicate that Congress anticipated that passage of Title VII would result in increased travel expenditures for virtually all federal agencies, as the Authority's Interpretation would require. See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess.

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[11] Union travel expenses and per diem can add up to a significant amount. Soon after the Authority issued its Interpretation and Guidance stating that Title VII requires federal agencies to pay such costs, an official of the Office of Personnel Management estimated that the new interpretation would cost 15 federal agencies over $2 million per year. See Gov't Empl. Rel. Rep. (BNA) No. 852, at 11 (Mar. 10, 1980). Payment of these expenses can impose a substantial burden on agencies. For example, in *EEOC* and *EEOC Council 216, AFGE*, 80 F.S.I.P. 38, at 5 n.6 (Dec. 4, 1980), a Factfinder's Report for the Federal Service Impasses Panel noted that, out of a total cost of $445,140 for negotiation of a basic collective bargaining agreement covering a single agency, travel expenses and per diem for employee union representatives amounted to $107,302. This amount was in addition to the $110,357 spent by the agency on salaries of the employee union representatives during the negotiations.

Within a year of the passage of Title VII, Congress indicated that its desire was to reduce agency travel expenditures, not to raise them. In September 1979, Congress enacted Section 501 of Pub. L. No. 96-74, 93 Stat. 572, the Treasury, Postal Service and general government appropriations bill, which restricted travel funds for the covered agencies to the amounts set forth in the agency budget estimates. A month later, Congress voted by joint resolution (Section 112 of Pub. L. No. 96-86, 93 Stat. 661) to reduce substantially the amounts spent on government travel in the following fiscal year.

89-98 (1978) (cost estimates for Civil Service Reform Act of 1978).

There is no question that Congress intended to make certain changes in the federal labor-management relations program when it enacted Title VII. However, it expressly articulated those changes in both the statute itself and the legislative history. For example, Section 20 of Exec. Order No. 11491, 3 C.F.R. 873 (1966-1970 Compilation) allowed agencies to agree to grants of official time to employee union negotiators up to 40 hours or up to one-half of the bargaining time during regular working hours (see page 6, *supra*). The Senate version of Title VII would have continued these limitations (see S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978); *Legis. Hist.* 772), while the House bill provided for unlimited official time for employee union negotiators during the hours they otherwise would be in a duty status (H.R. Rep. No. 95-1403, *supra*, 58; *Legis. Hist.* 704). During the debate on Title VII, there was specific discussion of a revision in the official time policy (see, *e.g.*, 124 Cong. Rec. 29188 (1978)), and Congress adopted the House approach, which was codified in 5 U.S.C. (Supp. V) 7131. This express change with respect to official time stands in sharp contrast to Congress' complete silence on the subject of travel expenses and per diem. That silence suggests an intent to retain the settled practice. See, *e.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). This conclusion is reinforced by the statement of Representative Udall, the primary sponsor of Title VII: "What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. * * * The Federal employee unions do not get much out of this amendment process that is not

already in the Executive order." 124 Cong. Rec. 29182 (1978); *Legis. Hist.* 923.[12]

Another indication that Congress did not intend any implicit change in the treatment of union travel expenses and per diem is that payment by the employer of such expenses is not the norm in the private sector. The National Labor Relations Board has compelled employers to pay union travel expenses only as an extraordinary remedy for an employer's failure to bargain in good faith. See *Div. of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45, 48-49 (2d Cir. 1982), petition for cert. pending, No. 82-1021 (filed Dec. 16, 1982); *Marriott In-Flite Services*, 258 N.L.R.B. 755 n.1, 770 (1981); *J.P. Stevens & Co.*, 239 N.L.R.B. 738, 739, 773 (1978).[13] Cf. *Library of Congress* v. *FLRA*, No. 82-1240 (D.C. Cir. Feb. 25, 1983), slip op. 13 (reference to private sector precedent may be relevant to determination of public sector bargaining issues arising under Title VII). As the Second Circuit has observed,"[o]ne of the obvious and universal purposes of collecting union dues is to pay for the expenses of such important activities as collective bargaining with the employer." *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 49. Given the pre-Title VII practice with respect to union travel expenses and per diem in the federal sector and the prevailing practice in the private sector, Congress surely would have expressed affirmatively any in-

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[12] We do not suggest that the Authority is bound by rules set by its predecessor, the Federal Labor Relations Council. Rather, our argument is that the Authority is bound by congressional intent and that Congress did not intend to change the existing practice with respect to payment of travel expenses and per diem.

[13] The Eleventh Circuit has noted that if the Authority's position prevails, "the Federal Government would be the only federally regulated employer required to pay the travel and per diem expenses incurred by union negotiators." *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 n.11.

tent to impose a new and different rule. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279, 285 n.13 (1974). There is no such expression here. Accordingly, it is most unlikely that Congress would have "meant the government to assume such an unusual burden, so different from any accepted practice in dealings between employers and employees, absent a clear and specific provision to that effect." *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 49.

2. If anything, the provisions of Title VII indicate that, contrary to the FLRA Interpretation and Guidance, Congress had no intention of requiring federal agencies to pay travel expenses and per diem of employee union negotiators. Section 7131(a) itself refers to official time for employees in terms of the period they "otherwise would be in a duty status." But per diem allowances are primarily designed to cover expenses usually incurred outside the time an employee normally would be in a duty status—breakfast, dinner, and overnight lodging. Travel expenses also frequently are incurred outside an employee's regular duty hours. Thus, the reference to duty status suggests that Congress did not view Section 7131(a) as a vehicle for requiring federal agencies to pay for union travel expenses and per diem.

In addition, the Authority's ruling on travel expenses and per diem cannot be squared with Congress' mandate that the provisions of Title VII are to be interpreted in a manner consistent with "the requirement of an effective and efficient Government." See 5 U.S.C. (Supp. V) 7101(b). A system under which one party bears virtually the entire costs of negotiation—including salaries, travel expenses and per diem allowances for both its own representatives and those of the other party to the negotiation—does not advance that goal. Such a system is bound to impose unequal pressure on the parties at the bargaining table, since only one

party, the agency, incurs the cost of prolonged negotiations. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 n.11 (characterizing Authority's position on travel expenses and per diem as "a windfall to unions, which would no longer bear the same economic incentive as the Government to negotiate quickly and effectively").[14] As a result, agencies may be forced to compromise at an early stage, particularly when agency budgets are tight. Bargaining under these circumstances cannot be regarded as either effective or efficient from the perspective of the government as a whole or of the public interest.

Finally, the Authority's interpretation frustrates one of the most important policies underlying the statute—reducing labor-management friction in the federal sector. See 5 U.S.C. (Supp. V) 7101(a)(1)(C) (finding that collective bargaining "facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment"). A requirement that agencies pay union travel expenses and per diem tends to increase such friction rather than reduce it. An agency that pays for union travel presumably must monitor and control that travel on a regular basis to ensure that it is reasonable and necessary, as part of the agency's responsibility to account for expenditure of public funds.[15] Thus, the agency would be obliged to regulate what otherwise would be internal union matters, such as manner of travel for union representatives, locations from which they travel, and lengths of their stays. Such monitoring will lead

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[14] Even when a union fulfills its statutory duty to bargain in good faith (5 U.S.C. (Supp. V) 7114(b)), its willingness to compromise on difficult issues surely will be less if it has no obligation with respect to the cost of the negotiations.

[15] An agency may be required to monitor travel expenses in connection with investigations by the General Services Administration. See 5 U.S.C. 5707(b).

inevitably to disagreements between unions and agencies. Moreover, it forces agencies to take actions that encroach on the independence of unions in a manner that Congress could not have intended. See, *e.g.*, 5 U.S.C. (Supp. V) 7116(a)(3) (making it an unfair labor practice for an agency to sponsor, control, or otherwise assist any labor organization, except with respect to routine services and facilities).[16]

The tension between agencies and unions caused by the Authority's Interpretation is well illustrated by *Dep't of the Air Force, Air Force Logistics Command* and *AFGE, Council 214*, 10 F.L.R.A. No. 53 (Sept. 30, 1982). In that case the Air Force declined to pay travel expenses and per diem allowances for certain employee union negotiators whom the union wished to bring from a distant location, because the union failed to explain why employee union representatives stationed at the bargaining site, rather than those stationed at the dis-

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[16] The Authority's Interpretation is inconsistent with 5 U.S.C. (Supp. V) 7106(a) as well. In that section, Congress stated that nothing in Title VII is to affect the authority of an agency "to determine the mission, budget, organization, number of employees, and internal security practices of the agency * * *." 5 U.S.C. (Supp. V) 7106(a)(1). The Authority's creation of a requirement that agencies use appropriated funds for travel expenses and per diem of employee union representatives undermines an agency's control of its budget, since it forces the agency to make direct adjustments to a particular component of its budget. The result of the Authority's order is that agencies must reallocate existing funds and also increase their appropriations requests for travel in the future. Since agency travel funds are the subject of direct attention by Congress and are closely controlled by Congress and by agencies themselves (see page 18 note 11, *supra*), the Authority's ruling here is different from a situation in which the Authority orders an agency to take action that indirectly requires expenditure of funds or the payment of money to remedy an unfair labor practice. Thus, the Authority's ruling conflicts with Congress' intent to exclude unions from agency budget decisions.

tant location, could not be used for the negotiations. The union's refusal to justify its expenditures made it impossible for the Air Force to certify that the travel demanded by the union was essential, as required by departmental regulations. The union filed an unfair labor practice charge, and the Authority concluded that the Air Force's failure to pay for the travel demanded by the union constituted an unfair labor practice, despite the fact that payment in the absence of explanation would have violated governing regulations.

Similar disputes are certain to arise in other agencies and in other locations. Unless agencies surrender complete control over a certain percentage of funds set aside for travel, they will have to exercise some control over how unions spend travel funds. Dissension is especially likely toward the end of each fiscal year when agency funds may be scarce and many agencies must eliminate all but essential expenditures and travel. An agency's refusal to provide complete reimbursement for union travel because it has limited travel to those trips that are essential to the agency's mission will surely trigger more disagreements between agencies and unions, thus undermining the harmony Congress sought to foster.[17]

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[17] An agency can exercise some control over union travel costs because Section 7131(a) limits the number of employee union negotiators for whom official time is authorized to a level equal to the number of agency negotiators. But this proviso does not necessarily allow an agency to determine that particular union travel is reasonable or necessary. Furthermore, it would not be in the interest of effective labor relations for an agency to limit the size of its own representation solely for the purpose of keeping union travel costs low during a time of budgetary constraint.

The Authority has suggested in the courts of appeals that more recent rulings will reduce problems of union/agency friction caused by its Interpretation. Under these rulings, an employee union representative must be part of the relevant bar-

B. The Court of Appeals Failed to Apply, or Misapplied, Well-Established Principles of Statutory Construction in Affirming the Authority's Interpretation of 5 U.S.C. (Supp. V) 7131(a)

1. As the preceding section indicates, there is not a shred of evidence in Title VII or its history that Congress intended to require an agency to pay the travel expenses and per diem of employee union representatives engaged in collective bargaining with the agency. Given the absence of any indication of congressional intent to impose such a requirement, the court of appeals' affirmance of the Authority's Interpretation and Guidance is clearly contrary to well-established rules of statutory construction.

In *United States* v. *Zazove*, 334 U.S. 602 (1948), this Court declined to read the National Service Life Insurance Act of 1940 in a manner that would increase sub-

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gaining unit in order to be on official time, and official time need not be authorized for negotiation of a local supplement to a national master agreement. See *Air Force Logistics Command, Wright-Patterson AFB, Ohio* and *Wright-Patterson AFB Fire Fighters*, 7 F.L.R.A. No. 118 (Jan. 22, 1982); Interpretation and Guidance, 7 F.L.R.A. No. 105 (Jan. 15, 1982). These rulings may lessen the impact of the Authority's Interpretation in some cases, but there is no indication that they would apply to a case like this one or to the others that have been considered by the courts of appeals. Moreover, the Authority has held that, to the extent authorization of official time is not required by statute, an agency must bargain about granting official time, even to employees outside the bargaining unit. See *United States Naval Space Surveillance Systems*, and *Local 2096*, 9 F.L.R.A. No. 30 (June 23, 1982), motion for reconsideration granted (Mar. 17, 1983), petition for review pending, Nos. 82-1726, 82-1897 (4th Cir.). The Authority has further held that agencies must pay travel expenses and per diem even when official time is negotiated by the parties pursuant to 5 U.S.C. (Supp. V) 7131(d), rather than required under Section 7131(a). See *National Treasury Employees Union* and *Dep't of the Treasury, U.S. Customs Service*, 9 F.L.R.A. No. 70 (July 21, 1982), petition for review pending, No. 82-2116 (D.C. Cir.).

stantially the cost to the United States in the absence of an express statement that Congress intended such a result, despite the respondent's argument that such a reading would effectuate the beneficial purposes of the Act. The Court observed that "Congress nowhere specified that the United States would bear the huge cost of the enhanced liability" that would result from the interpretation urged by the respondent (*id.* at 616-617) and concluded that "that striking omission is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated" (*id.* at 617; footnote omitted). The Court cited (*id.* at 617 n.24) the statement of Mr. Justice Holmes, writing for the Court in *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922): "A liability in any case is not to be imposed upon a government without clear words * * * and where, as here, the liability would amount to great sums, only the plainest language could warrant a court in taking it to be imposed * * *." See also *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion; citation omitted): "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

The principle articulated in *Zazove* counsels against interpreting 5 U.S.C. (Supp. V) 7131(a) in a manner that requires agencies to pay travel expenses and per diem for employee union representatives. The Eighth Circuit recognized that application of the principle leads to rejection of the Authority's Interpretation: "Because we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for [travel expenses and per diem of employee union representatives]." *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d

1242, 1247 (1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 (rejecting the view "that Congress, without the briefest of references to the matter, intended the Government to assume this potentially enormous financial liability").

Indeed, the court of appeals' ruling is contrary to the more general principle that waivers of sovereign immunity must be strictly construed. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court's decision in *Testan* makes clear that these principles are fully applicable to a monetary claim by a federal worker arising out of an employment relationship.[18] See also *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982). Because Congress made no mention of agency payment of travel expenses and per diem of employee union representatives in either Title VII or its history, there is no unequivocally expressed waiver of sovereign immunity that would permit a court to enforce an order mandating such payments.[19]

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[18] In *Testan* two federal employees asserted claims for back pay, alleging that their positions should have been classified at a higher grade. The Court rejected the claims on the ground that the United States had not waived sovereign immunity with respect to money damages of the type sought by the employees. The Court indicated that even if the Civil Service Commission were to find that the employees' positions had been misclassified, and thus that they should have received higher salaries in the past, the employees could not obtain a monetary award against the federal government in the absence of a statute waiving sovereign immunity. 424 U.S. at 404-405.

[19] We do not contend that the Authority may not order appropriate monetary relief once it has found that an agency has

2. Instead of applying the relevant principles of statutory construction stated in *Zazove* and in the cases involving waivers of sovereign immunity, the court of appeals invoked the principle of deference to an agency's construction of a statute it administers. The court concluded that the Authority's Interpretation should be given deference if it is "reasoned and supportable" and if it is "reasonably defensible" (Pet. App. 5a). But such deference is inappropriate in this case. As the court of appeals recognized (*id.* at 4a), the Interpretation and Guidance is an interpretative rule and therefore is entitled to less weight than a rule issued pursuant to the FLRA's rulemaking authority. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1881. Moreover, courts are the final authorities on issues of statutory construction (see *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978)), and they "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965). Finally, "'[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Id.* at 292, quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). Whether to require federal agencies to expend substantial sums to fund employee union travel and per diem is plainly a "major policy decision[ ] properly made by Congress."

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committed an unfair labor practice. See 5 U.S.C. (Supp. V) 5596(b). However, there must first be an unfair labor practice to be remedied. The Authority may not, as it has done here, identify an unfair labor practice by stretching the statute to find an implied duty to pay.

Deference to the Authority is particularly unwarranted in this case because its Interpretation is based largely on construction of a statute it does not administer. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1882; *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1247; *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 48. The Authority reasoned (Pet. App. 43a) that employee union representatives who were authorized "official time" for collective bargaining activity pursuant to Section 7131(a) must be conducting the "official business" of the government within the meaning of 5 U.S.C. (& Supp. V) 5701-5709. Under 5 U.S.C. (& Supp. V) 5702 employees "traveling on official business" are entitled to receive a per diem allowance. But Section 5702 and other parts of 5 U.S.C. (& Supp. V) 5701-5709, are administered not by the Authority but by the General Services Administration. In 5 U.S.C. 5707(a), Congress has delegated to the Administrator of General Services the authority to prescribe regulations necessary for the administration of 5 U.S.C. (& Supp. V) 5701-5709. As we discuss below, GSA has never construed the term "official business," as used in 5 U.S.C. (& Supp. V) 5701-5709, in the manner adopted by the FLRA.

C. The Reasoning Offered by the Authority in Support of Its Interpretation of 5 U.S.C. (Supp. V) 7131(a) Cannot Withstand Scrutiny

The court of appeals deferred to the FLRA on the question of per diem allowances and travel expenses because it concluded that the Authority's Interpretation and Guidance was "reasoned and supportable" (Pet. App. 11a). But an examination of the Authority's reasoning shows that none of the three justifications offered by the Authority in support of its Interpretation can withstand scrutiny. Indeed, three other courts of appeals have found the Authority's reasoning to be unpersuasive. See *Florida National Guard* v. *FLRA*,

supra; United States Dep't of Agriculture v. *FLRA*, *supra; Div. of Military & Naval Affairs* v. *FLRA*, *supra*.

1. First, the court below found it significant (Pet. App. 9a) that the Authority had read Section 7131(a) consistently with its prior interpretation of 5 U.S.C. (Supp. V) 7131(c). Section 7131(c) states that the Authority may require authorization of official time for employees participating on behalf of their unions in proceedings before the Authority. Although Section 7131(c), like Section 7131(a), nowhere mentions travel expenses or per diem allowances, the Authority had concluded that Section 7131(c) allows it to require agencies to pay such costs for employees who participate on behalf of their unions in Authority proceedings. See 5 C.F.R. 2429.13. But the Authority did not offer any reasons for its interpretation of Section 7131(c) when it promulgated its interim regulations. See 44 Fed. Reg. 44740, 44771 (1979). Moreover, no court has yet determined whether the Authority's reading of Section 7131(c) is proper. Thus, it is as unsupported as the Authority's construction of Section 7131(a). The fact that the Authority has interpreted the two provisions consistently does not suggest that either interpretation is correct. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1250 n.18.

2. Second, the court below accepted (Pet. App. 10a) the Authority's assertion that, because Congress declared collective bargaining in the federal sector to be in the public interest (see 5 U.S.C. (Supp. V) 7101(a)), employees serving as union bargaining agents must be conducting the "official business" of the government and therefore are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5701-5709. The latter statute provides for payment of a per diem allowance for "an employee while traveling on official business away from his designated post of duty." 5

U.S.C. (& Supp. V) 5702. But nothing in 5 U.S.C. (& Supp. V) 5701-5709, itself or in regulations issued by the Administrator of General Services indicates that collective bargaining by employee union representatives qualifies as "official business" within the meaning of the statute.[20] The Administrator has concluded that each individual agency is in the best position to determine when its employees are engaged in "official business" within the meaning of 5 U.S.C. (& Supp. V) 5701-5709. See FPMR 101-7, GSA Bulletin FPMR A–40, Supp. 1, Ch. 101.4 (Sept. 28, 1981) (except as otherwise provided by law, official travel must be authorized by the head of the agency or by an official to whom such authority has been delegated). The Authority's attempt to override the determinations of individual agencies in the area of collective bargaining thus is inconsistent with the Administrator's decision concerning how the statute should be administered.

The term "official business" normally refers to work done on behalf of an agency pursuant to a directive from an agency supervisor. But an employee negotiating on behalf of his union obviously must be beyond the authority of the agency when he acts in that capacity.[21] Unlike an agency representative, a union representative does not act on behalf of the agency; instead, his goal is to gain benefits for the members of the bargaining unit (including himself) and for the union. The Authority's conclusion that employee union representatives are engaged in "official business" seems to assume that opposing parties in collective bargaining pursue

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[20] As noted above, under 5 U.S.C. 5707(a) the Administrator of General Services is authorized to make rules for the administration of 5 U.S.C. (& Supp. V) 5701-5709.

[21] It would be incongruous for an agency to evaluate an employee's performance as a negotiator in the same manner as it would evaluate his performance while he is conducting "official business" on behalf of the agency.

the same goals. However, as this Court recently observed: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties * * * still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, No. 81-280 (June 29, 1982), slip op. 18, quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).

The Comptroller General has recognized the important difference between employee union representatives who are on official time during negotiations with an agency and employees who are conducting official business on behalf of the agency. Under the system that existed prior to passage of Title VII, employee union negotiators could receive official time for collective bargaining activities on a limited basis. The Comptroller General ruled that even though union/agency negotiations could be conducted on official time and "may contribute to the effective conduct of public business," employee union representatives could *not* be considered as conducting the official business of the United States. 44 Comp. Gen. 617, 618 (1965). The Comptroller General concluded: "On the contrary it would seem that such negotiations by employee representatives are primarily in the interest of the employee organization" (*ibid.*).[22] Although the Comptroller General's decision was issued while the executive order program was in effect, the distinction he drew between "official time" and "official business" is relevant under Title VII as

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[22] The Comptroller General subsequently modified this ruling (see page 6, *supra*), but only for special circumstances in which the agency concluded that travel by employee union representatives was primarily in the interest of the United States (*e.g.*, when an employee union representative traveled to a particular meeting location so that several agency representatives would not have to travel).

well. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248 n.11.

The Authority's reliance on Congress' general policy statements that federal sector collective bargaining is "in the public interest" and "contributes to the effective conduct of public business * * *" (5 U.S.C. (Supp. V) 7101(a)(B)) is misplaced. The Authority's reasoning, as the Eighth Circuit pointed out in *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248 (footnote omitted), "ignores the difference between the interest of the public at large and the interest of the Government as employer. While collective bargaining is generally in the public interest, employees representing their unions in collective bargaining do not primarily advance the interest of the Government." See also *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 48 (Congress' "general declaration of policy is 'too thin a reed' to support a substantive ruling which would cost the federal government substantial sums of money in per diem and travel expenses"); *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884 ("Congress' declaration that the statutory protection of collective bargaining is in the public interest does not imply an intent to underwrite the process entirely").[23]

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[23] There are other "public interest" activities for which federal employees may be excused from their regular duties and receive their salaries without being charged with annual leave, but for which they do not receive travel expenses and a per diem allowance. Such activities include voting, donating blood, and participating in certain military funerals. See Civil Service Comm'n, Federal Personnel Manual, FPM Supp. 990-2, bk. 630, subchap. S11 (May 23, 1968 rev'd July 1969). Thus, there is no inevitable link between paid time during absence from work in connection with public interest activities and reimbursement for travel expenses and per diem.

The FLRA's General Counsel apparently has concluded that a grant of official time does not lead automatically to payment of travel expenses and per diem. In *United States Consumer Product Safety Commission, New York*, Case No. 2-CA-612, an unfair labor practice charge filed with the Authority, six em-

If Congress had wished to provide that collective bargaining constitutes "official business" within the meaning of 5 U.S.C. (& Supp. V) 5701-5709, it could easily have so stated when it drafted Title VII. Its failure to do so suggests that it did not intend to equate the two types of activities. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1882 (characterizing as a "great leap of faith" the Authority's equation of negotiation on "official time" with being engaged on "official business for the Government").

3. Finally, the court below accepted (Pet. App. 10a) the Authority's reasoning that agency payment of union travel expenses and per diem would help equalize the positions of union representatives and management representatives. The Authority concluded that Congress had intended that union and agency representatives be accorded "similar prerogatives" (*id.* at 43a), citing only a statement by Representative Clay to the effect that labor organizations "should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities" (Pet. App. 44a, quoting 124 Cong. Rec. 29188 (1978) (emphasis added)). However, Representative Clay's statement refers only to official time; he nowhere mentions either travel expenses and per diem or any general obligation of agencies to equalize bargaining positions or "prerogatives" of the par-

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ployees had been granted official time pursuant to a collective bargaining agreement in order to participate in an arbitration hearing. The agency refused the employees' request for reimbursement of travel expenses and per diem. The Authority's Office of General Counsel advised the regional office that the charge filed by the union based on the agency's refusal to reimburse should be dismissed. See Federal Labor Relations Authority, Report on Case Handling Developments of the Office of the General Counsel, Jan. 1, 1981, through Mar. 31, 1981, at 23-24.

ties.[24] See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1883 n.9; *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1249-1250. Thus, the statement cited does not support the broad conclusion reached by the Authority.

Title VII itself indicates that Congress did not intend to create absolute equality between unions and agencies. In Section 7131(a) Congress expressly limited official time for employee union representatives to periods in which the employees otherwise would be in a duty status. No such limitation was imposed with respect to agency representatives. In addition, a union must bear the full cost of attendance at negotiations by any nonemployee negotiators (*e.g.*, members of the union's national staff). Congress did not impose any requirement that unions be provided with various services or items, such as secretarial support, calculators or briefcases, that might be thought necessary to equalize the positions of the parties. Although Congress itself took certain limited steps to alter the relative positions of federal employee unions and agencies, such as the change in the official time policy, there is no evidence that it delegated broad authority to the FLRA to order any additional steps that would alter the balance established by the express provisions of Title VII.

Moreover, genuine equality of treatment would call for each party to bear its own out-of-pocket costs, as is the norm in the pri ate sector (see page 20, *supra*).

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[24] Statements by Representative Clay concerning the meaning of Title VII should be read with some caution. Representative Clay strongly supported a bill that was considerably more union-oriented than the legislation that eventually was enacted; he supported the final version of the legislation with reluctance. See, *e.g.*, 124 Cong. Rec. 29182 (1978) (statement of Rep. Udall); 124 Cong. Rec. 29186 (1978) (statement of Rep. Clay); *Legis. Hist.* 923, 930-931. This Court has declined to give weight to the views of those who sponsor legislation significantly different from that eventually enacted. See *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968).

Federal employee unions have financial resources that can be used for payment of members' travel expenses and per diem. See 5 U.S.C. (Supp. V) 7115 (providing for collection of union dues). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884 (union dues are collected for expenses such as travel and per diem). Thus, employee union representatives would not necessarily pay their own expenses; instead, they would be in a position similar to that of agency negotiators, whose expenses are paid by the agency they represent. Under the Authority's Interpretation, however, one party bears virtually the full cost of both parties to the negotiations—a result that is difficult to square with either the principle of equality or the goal of effective and efficient collective bargaining. See pages 21-22, *supra*. As the Eleventh Circuit has pointed out: "If the entire financial burden of the negotiating process were shouldered by the Government, inequality—not equality—of bargaining status would result." *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884-1885.

In sum, neither the principle of equality nor the other justifications offered by the Authority can support its conclusion that Congress meant for the federal government, rather than the unions themselves, to underwrite the travel expenses and per diem of employee union representatives engaged in collective bargaining with federal agencies.[25]

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[25] The Authority also found support for its Interpretation in the fact that Congress rejected a Senate version of the federal labor relations legislation that would have carried forward the official time policies of Exec. Order No. 11491 (Pet. App. 42a n.6). But neither the House bill nor the Senate bill mentioned travel expenses or per diem; nor did the committee reports accompanying the bills refer to the subject. The conference report did not explain the substitution of the House version of the official time provision for the Senate version, nor did it mention travel expenses or per diem. See H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. (1978). Thus, the rejection of the Senate version does not suggest any change in the existing policy with respect

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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to travel expenses and per diem. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248-1249.

The Authority further found it significant that Title VII expresses the purpose of encouraging collective bargaining, while Exec. Order No. 11491 on its face did not. But it is clear that encouragement of collective bargaining was an underlying purpose of the executive order program. See, *e.g.*, Section 11(a) of Exec. Order No. 11491, 3 C.F.R. 868 (1966-1970 Compilation) (*Legis. Hist.* 1250) (agencies and labor organizations "shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions"), as well as the preamble to that Executive Order, 3 C.F.R. 861 (1966-1970 Compilation) (*Legis. Hist.* 1244) (stating that efficient administration of the government is benefited by providing employees an opportunity to participate in formulation and implementation of personnel policies and practices and that such participation should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials). The restatement of these principles in different language in Title VII does not suggest anything about whether the union or the federal government is to pay travel expenses and per diem incurred by employee union representatives.